

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEPHEN McCOLLUM and SANDRA
McCOLLUM, individually, and
STEPHANIE KINGREY, individually and
as independent administrator of the
ESTATE OF LARRY GENE
McCOLLUM,
Plaintiffs,

V.

BRAD LIVINGSTON, et al.,
Defendants.

[illegible]

CIVIL ACTION NO. 4:14-cv-03253

DEFENDANT THE UNIVERSITY OF TEXAS MEDICAL BRANCH'S NOTICE OF INTERLOCUTORY APPEAL BASED ON ELEVENTH AMENDMENT IMMUNITY

Notice is given that Defendant The University of Texas Medical Branch at Galveston (“UTMB”) appeals to the United States Court of Appeals for the Fifth Circuit. UTMB appeals from the district court’s Memorandum and Order dated February 3, 2017 (DE #342). UTMB appeals the district court’s denial of its entitlement to the affirmative defense of Eleventh Amendment immunity for claims brought pursuant to the Americans with Disabilities Act (“ADA”). *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 139-40 (1993) (“We hold that States and state entities that claim to be ‘arms of the State’ may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.”); *see also United States v. Georgia*, 546 U.S. 151, 159 (2006) (holding that Title II of the ADA validly abrogates state sovereign immunity under the Fourteenth Amendment only in certain cases).

UTMB and Defendant Texas Department of Criminal Justice (“TDCJ”) also filed an Opposed Motion for Certification of Interlocutory Appeal Regarding Plaintiffs’ ADA and Rehabilitation Act (“RA”) Claims pursuant to 28 U.S.C § 1292(b). (DE #343). The district court has not yet ruled on the motion.

UTMB also appeals the district court’s denial of summary judgment regarding whether the Plaintiffs stated a claim pursuant to the ADA and RA, pursuant to pendent appellate jurisdiction. These issues are appealed pursuant to pendant appellate jurisdiction based upon the exceptional circumstances of this case because the issues are inextricably intertwined with the Eleventh Amendment Immunity issues, and there is a necessity to ensure meaningful review of the appealable portion of the order. *Hernandez v. Terrones*, 397 F. App’x 954, 963-964 (5th Cir. 2010) citing *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir.1998) (“Pendant [sic] appellate jurisdiction is only proper in rare and unique circumstances where a final appealable order is ‘inextricably intertwined’ with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order”).

UTMB does not appeal the portion of the district court’s Memorandum and Order which dismissed the Plaintiffs’ ADA/RA injunctive relief claims for lack of standing (DE #342 at 64-65).

Defendant UTMB will be an appellant in the appeal before the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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MEDICAL BRANCH

NOTICE OF ELECTRONIC FILING

I, **J. Lee Haney**, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a correct copy of the foregoing in accordance with the Electronic Case Files System of the Southern District of Texas, on March 3, 2017.

/s/ J. Lee Haney

J. LEE HANEY

Assistant Attorney General

CERTIFICATE OF SERVICE

I, **J. Lee Haney**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served on all counsel of record via electronic mail on March 3, 2017, as authorized by Fed. R. Civ. P. 5(b)(2) and in accordance with the electronic case filing procedures of the United States District Court for the Southern District of Texas.

/s/ J. Lee Haney
J. LEE HANEY
Assistant Attorney General